Office-Supreme Court, U.S.
FILED
DEC 29 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-438.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
PETITIONER,

v.

GERALD HILL AND JOSEPH CRAWFORD,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief of the Petitioner.

FRANCIS X. BELLOTTI,
Attorney General,

BARBARA A.H. SMITH,
Assistant Attorney General, Chief,
Criminal Appellate Division,
Counsel of Record

MARTIN E. LEVIN,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

38

Questions Presented.

I. Whether prison inmates have a substantive due process right to judicial review of prison disciplinary board findings?

II. Whether, under the due process clause, the findings of a prison disciplinary board should be reviewed under a standard more stringent than review for action which is arbitrary, capricious, or an abuse of discretion?

Table of Contents.

Opinions below 1

Jurisdiction 2

Constitutional provision involved 2

Statement of the case 2

Statement of facts 3

Summary of the argument 4

Argument 5

I. There is no constitutional right to judicial review for the legal sufficiency of the evidence adduced at a prison disciplinary hearing 5

A. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) does not mandate judicial review 5

B. Lower federal court decisions do not require review of the sufficiency of evidence in disciplinary hearings 9

C. Entitlement to procedural protections in general, does not imply a concomitant right to review for sufficiency of the evidence 12

II. The substantive content of the due process clause is the protection against arbitrary governmental deprivation of some right 15

A. The requisite procedural protections are determined by the specific context of the proceeding 15

B. Substantive due process review of prison disciplinary board findings should be limited to errors which are so flagrant or manifest as to constitute an arbitrary deprivation of the prisoner's liberty interest 17

Conclusion 22

Addendum 23

Table of Authorities Cited.

CASES.

Association for Reduction of Violence v. Hall, 558 F.Supp. 661 (D. Mass. 1983), vacated on other grounds, 734 F.2d 63 (1st Cir. 1984) 20n

Baxter v. Palmigiano, 425 U.S. 308 (1976) 11, 21n

Bell v. Wolfish, 441 U.S. 520 (1979) 17, 19

Block v. Rutherford, U.S. , 104 S.Ct. 3227 (1984) 16, 19

Bowling v. United States, 552 F.Supp. 54 (Ct. Cl. 1982), aff'd, 713 F.2d 1558 (Fed. Cir. 1983) 14

Burns v. Wilson, 346 U.S. 137 (1953) 14, 19

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 15

Cepulonis v. Fair, 732 F.2d 1 (1st Cir. 1984) 20n

Dreyer v. Illinois, 187 U.S. 71 (1902) 7

Glick v. Sargent, 696 F.2d 413 (8th Cir. 1983) 11

Goldberg v. Kelly, 397 U.S. 254 (1970) 8, 12

Goss v. Lopez, 419 U.S. 565 (1975) 21

Griffin v. Illinois, 351 U.S. 12 (1956) 7

Hanrahan v. Lane, No. 82-2892 (7th Cir. October 30, 1984), slip opinion at 6 6

Hewitt v. Helms, 459 U.S. 460 (1983) 15, 16, 18

Hiatt v. Brown, 339 U.S. 103 (1950) 14

Hill v. Superintendent, Massachusetts Correctional Institution, Walpole, 392 Mass. 198, 466 N.E.2d 818 (1984) 1, 5, 6n, 9, 14n

Hudson v. Palmer, U.S. , 104 S.Ct. 3194 (1984) 16

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 17

Jones v. Wittenburg, 509 F.Supp. 653 (N.D. Ohio 1980) 20n

Joseph Crawford and Gerald Hill v. Joseph Ponte, Civil Nos. 136746 and 136747 (Norfolk, SS. January 25, 1983) 1

Landon v. Plasencia, 459 U.S. 21 (1982) 13n, 16

Levy v. Parker, 478 F.2d 772 (3rd Cir. 1973), aff'd, 417 U.S. 733 (1974) 14

Lindsey v. Normet, 405 U.S. 56 (1972) 7

Mathews v. Eldridge, 424 U.S. 319 (1976) 15, 16

McGinnis v. Stevens, 543 P.2d 1221 (Ala. 1975) 11

McKane v. Durston, 153 U.S. 684 (1894) 7

Meachum v. Fano, 427 U.S. 215 (1976) 16, 18

Middendorf v. Henry, 425 U.S. 25 (1976) 17

Morrissey v. Brewer, 408 U.S. 471 (1972) 6, 8n

Olim v. Wakinekona, 461 U.S. 238 (1983) 18

Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) 5, 12

Owings v. Secretary of United States Air Force, 447 F.2d 1245 (D.C. Cir. 1971), cert. denied, 406 U.S. 926 (1972) 14

Parham v. J.R., 442 U.S. 584 (1979) 21

Parker v. Levy, 417 U.S. 733 (1974) 16

Redding v. Fairman, 717 F.2d 1105 (7th Cir. 1983), cert. denied, 104 S.Ct. 1282 (1984) 11

Reetz v. Michigan, 188 U.S. 505 (1903) 7

Rhodes v. Chapman, 452 U.S. 337 (1981) 20n

Riner v. Raines, 274 Ind. 113 (1980) 8

Russell v. Division of Corrections, Commonwealth of Virginia, 392 F.Supp. 476 (W.D. Va. 1975), aff'd, 530 F.2d 969 (4th Cir. 1975) 10

Schlesinger v. Councilman. 420 U.S. 738 (1975) 14, 19

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 13

Scott v. DeJarnette, 470 F.Supp. 766 (E.D. Ark. 1979) 11

Smith v. Rabalais, 659 F.2d 539 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982) 9, 10

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 18

Tisi v. Tod, 264 U.S. 131 (1924) 12, 13, 19

United States v. Augenblick, 393 U.S. 348 (1969) 14, 19

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) 13

Whelchel v. McDonald, 340 U.S. 122 (1950) 14

Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974) 10, 11

Wilwording v. Swenson, 502 F.2d 844 (8th Cir. 1974), cert. denied, 420 U.S. 912 (1975) 9, 10

Wolff v. McDonnell, 418 U.S. 539 (1974) 4, 5, 6, 7, 8 et seq.

STATUTES.

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 4, 9, 10, 11

Massachusetts General Laws
c. 30A, §§ 1(2) and 1A 6n
c. 249, § 4 6n

REGULATIONS.

103 Code Mass. Regs.
§ 430.11 19n
§ 430.18 14n
§ 430.22 17

MISCELLANEOUS.

Correctional Disciplinary Statistics–1980, Mass. Dept. Correction, Table 4, p. 12 (1983) 19n

Burger, An Agenda for Crime Prevention and Correctional Reform, 67 ABA Journal 988 (1981) 20n

Burger, More Warehouses, or Factories with Fences?, 8 New Eng. J. Prison Law 111 (1982) 20n

Widener, Foreward: The Impact of Judicial Decision-Making, 37 Wash. and Lee L. Rev. 373 (1980) 20n

Phillips, Foreward: Fourth Circuit Review, 39 Wash. and Lee L. Rev. 425 (1982) 20n

Sourcebook of Criminal Justice Statistics, U.S. Dept. of Justice, Table 5.8, p. 469 (1982) 20n

Jacobs, Stateville: The Penitentiary in Mass Society, 106 (1977) 20n

Bershad, The Law and Corrections: A Management Perspective, 4 New Eng. J. Prison Law 49 (1977) 20n

Singer, Prisoner Rights Litigation: A Look at the Past Decade and a Look at the Coming Decade, 44 Federal Probation 3 (1980) 20n

Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610 (1979) 20n

No. 84-438.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

JOSEPH PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, WALPOLE,
PETITIONER,

v.

GERALD HILL AND JOSEPH CRAWFORD,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief of the Petitioner.

Opinions Below.

The opinion of the Supreme Judicial Court, *Hill* v. *Superintendent, Massachusetts Correctional Institution, Walpole (and a companion case)*, is reported at 392 Mass. 198, 466 N.E.2d 818 (1984), and is reproduced as App. A to the Petition for Writ of Certiorari. The opinion of the Massachusetts Superior Court is unreported. *Joseph Crawford and Gerald Hill* v. *Joseph Ponte*, Civil Nos. 136746 and 136747 (Norfolk, SS. January 25, 1983). It is reproduced as App. B to the Petition for Writ of Certiorari.

Jurisdiction.

The decision of the Supreme Judicial Court was issued June 19, 1984. Issuance of the rescript was stayed, on motion, pending the filing of a Petition for Writ of Certiorari. The petition for writ of certiorari was filed on September 17, 1984, and was granted on November 13, 1984. The jurisdiction of this Court is claimed under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

The Constitutional provision involved in this case is the following clause of the Fourteenth Amendment to the Constitution of the United States:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Statement of the Case.

The respondents, Hill and Crawford, are inmates in the care and custody of the Massachusetts Department of Correction. On June 8, 1982, Hill and Crawford filed *pro se* complaints in Massachusetts Superior Court, against Joseph Ponte, Superintendent of the Massachusetts Correctional Institution (M.C.I.), Walpole. The complaints challenged the sufficiency of the findings of a Walpole disciplinary board, removing good time credits, on the ground, *inter alia*, that the findings were not supported by the evidence before the board (J.A. 9a).

Ponte moved for summary judgment. After submission of pertinent records and affidavits, the court denied Ponte's Motions for Summary Judgment and granted Summary Judgment

in favor of Hill and Crawford, "voiding" the findings of the disciplinary board and restoring good time which had been lost by Hill and Crawford as a result of the disciplinary proceedings (J.A. 33a).

On appeal, the Supreme Judicial Court held that, under the Due Process Clause of the United States Constitution, prison inmates are entitled to judicial review of the sufficiency of the evidence supporting a disciplinary board's findings. Affirming the ruling of the Superior Court, the Supreme Judicial Court held that there was insufficient evidence to permit the disciplinary board's findings (App. A to Pet.)

Statement of Facts.

On May 2, 1982, Hill and Crawford, inmates at M.C.I., Walpole, each received a prison disciplinary report. They were each charged with 1) fighting with, assaulting or threatening another inmate, 2) use of obscene, abusive or threatening language, action, or gesture to an inmate, and 3) attempting to commit, aiding another to commit, or making plans to commit the foregoing offenses.

On May 11, 1982, Crawford and Hill each received a disciplinary hearing on the above charges. At Hill's hearing, the board considered the testimony and report from the reporting officer, Sergeant Maguire. Maguire heard an inmate twice say loudly, "What's going on?" Through a window he saw some commotion close to the other side of a door. Upon immediate investigation, Maguire found an inmate (Peter Stephens) bleeding from his mouth and suffering from a swollen eye. Dirt was strewn about the area, which was enclosed by a chain link fence. Maguire saw only three inmates other than the victim within the bounded area, and they were jogging away

together. Two of the three jogging inmates were Hill and Crawford. Maguire also told the board that the medic stated that Stephens had been beaten. Hill testified that he knew nothing about the incident. He also offered an affidavit from the assaulted inmate stating that "Gerald Hill had nothing to do with my present injuries" (J.A. 17a).

At Crawford's hearing, the board heard essentially the same evidence from Sergeant Maguire.[1] Crawford testified that he did not know what happened and that he had been checked for signs of a scuffle and nothing was found. Crawford further told the board that the victim had written an affidavit stating that Crawford was innocent (J.A. 27a).

The board found that Hill and Crawford, along with the third inmate observed by Maguire, had planned, aided, or participated in the charged assault (J.A. 27a). The board combined all of the charges into one offense, and recommended sanctions of fifteen days in isolation and 100 days loss of good time for Hill and Crawford (J.A. 27a). On May 20, 1982, Superintendent Ponte, denied each inmate's appeal of the disciplinary board's findings (J.A. 29a).

Summary of the Argument.

The Supreme Judicial Court held that inmates have a constitutional right to judicial review of the sufficiency of evidence upon which a disciplinary sanction, resulting in loss of "good time" credits, is levied. The holding neither follows from *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), nor does it accord with lower federal court decisions regarding the scope of judicial review in proceedings pursuant to 42 U.S.C. § 1983.

---

[1] The hearing record from Crawford's hearing does not indicate that Maguire told the board of the medic's conclusion that Stephens had been beaten (J.A. 27a).

Historically this court has held that there is no constitutional right to appellate review. Moreover, pursuant to *Wolff* the only due process requirements in the context of prison disciplinary hearings are procedural protections designed to protect the fundamental constitutionally protected right to be free from arbitrary and capricious deprivation of a recognized liberty or property interest. The procedural requirements enunciated in *Wolff* are not consistent with judicial review of the sufficiency of the evidence. The establishment of procedural protections has not led to establishment of judicial review of sufficiency of the evidence claims in analogous situations. See *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). In fact such review has been specifically rejected in the context of courts-martial and deportation hearings (pp. 5-15).

Given the fundamental purpose of the due process clause and the necessary flexibility which must be accorded prison officials in maintaining internal discipline, judicial review must be limited. Once the procedural requirements of *Wolff* have been observed, the only further due process requirement is that an inmate not suffer deprivation of a liberty interest as a result of arbitrary or capricious official action. In reaching this determination the Federal Courts have limited review to whether "any evidence" supports the decision (pp. 15-22).

Argument.

I. There Is No Constitutional Right to Judicial Review for the Legal Sufficiency of the Evidence Adduced at a Prison Disciplinary Hearing.

A. Wolff *v.* McDonnell, *418 U.S. 539 (1974) Does Not Mandate Judicial Review.*

In *Hill* v. *Superintendent, M.C.I., Walpole*, 392 Mass. 198, 466 N.E.2d 818 (1984), the Supreme Judicial Court held that

an inmate who is deprived of a state-created liberty interest by a prison disciplinary board is entitled, under the due process clause, to judicial review of the legal sufficiency of the evidence supporting the disciplinary board's findings.[2] Though this right apparently does not encompass a *de novo* evidentiary hearing, it does entail "independent review" by the court of the legal adequacy of the evidence before the board, even where the board's decision was made in good faith and regardless of whether the inmate has received all of the procedural due process protections to which he has a right. 392 Mass. at 201-202, 466 N.E.2d at 821. Although the court stated that this Court did not rule on this precise issue in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the court concluded that a right to such review "logically follows" from this Court's opinion in *Wolff*.

However, nothing in this Court's opinion in *Wolff* serves as a logical predicate for the Supreme Judicial Court's ruling. In *Wolff*, this Court held that where an inmate has a state created right to good time, of which he can be deprived only for serious misbehavior, he is entitled, under the due process clause, to certain minimal procedural safeguards in determining whether such misbehavior has occurred. 418 U.S. at 557. Quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972), the Court held, with respect to procedural requirements, that an inmate has a right to " 'a written statement by factfinders as to the evidence relied on and reasons' for the disciplinary action." *Wolff* at 564. The purpose of such a requirement was stated to be: "a written record helps to insure that administrators, faced

[2] Although the Massachusetts Legislature has exempted the findings of prison disciplinary boards from substantive judicial review under the Massachusetts Administrative Procedures Act, *see* Mass. Gen. Laws c. 30A, §§ 1(2) and 1A; *Hill* v. *Superintendent*, 392 Mass. at 199 n.3, 466 N.E.2d at 820 n.3, the Supreme Judicial Court held that the proper avenue for asserting the constitutional right to review in the state court is an action in the nature of certiorari under Mass. Gen. Laws c. 249, § 4. *Hill* v. *Superintendent*, 392 Mass. at 199 n.3, 466 N.E.2d at 819 n.2.

with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." *Wolff* at 565. From this language the Supreme Judicial Court inferred that this court had created an independent constitutional right to judicial review of the sufficiency of evidence introduced in disciplinary hearings. Such an inference is not only strained, it is totally inconsistent with this Court's traditional view of the scope of judicial review in general.

Historically there is no constitutional right to judicial appellate review in criminal cases. As stated in *McKane* v. *Durston*, 153 U.S. 684, 687 (1894) "[a] review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law." See also *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). Moreover, this Court has held, consistent with due process, that administrative agencies may make final determinations of legal questions, which are not subject to judicial oversight (*Reetz* v. *Michigan*, 188 U.S. 505, 507 (1903)), noting that "[d]ue process is not necessarily judicial process." The Court also has upheld, against constitutional attack, a statute which granted final unreviewable authority to a board of penal authorities to grant parole. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902). More recently this Court reiterated that the Due Process Clause does not require the state to provide appellate review at all. *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972). Where appellate review in general is not required, it would be anomolous to suggest that the constitution required such review in the limited and highly specialized context of prison disciplinary hearings.

Wolff v. *McDonnell*, 418 U.S. 539, merely required that certain minimal procedural rights be accorded inmates at disciplinary hearings to the end that a constitutionally protected liberty interest not be arbitrarily or capriciously denied. This

Court did not create a hitherto unrecognized substantive, independent, constitutionally required right to judicial review of the factfinding body.

Moreover, the Court's passing reference to the possibility of review by a court is more consistent with review for a claim of unconstitutional deprivation by reason of arbitrary and capricious official action, (as will be discussed, *infra*), than as establishing an independent constitutional right of judicial review of the sufficiency of evidence. Indeed, the lack of formality apparently required in the written statement indicates that it was not contemplated for use in a reviewing court to establish the "legal sufficiency" of the evidence. The requisites of the statement were described in *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).[3] "To demonstrate compliance . . . the decision maker should state the reasons for his determination and indicate the evidence he relied on . . ." although such statement "need not amount to a full opinion or even formal findings of fact and conclusions of law." *Id.* *Wolff* also grants prison administrators the discretion to exclude from their statement of evidence those items of evidence which might implicate institutional or personal safety. 418 U.S. at 565. There appears to be no requirement that the statement include a summary of all the evidence. As one court has noted, "[n]o opportunity would be provided by such a document to determine whether such informally stated findings were themselves supported by substantial evidence in the record taken as a whole." *Riner* v. *Raines*, 274 Ind. 113, 117, 409 N.E.2d 575 (1980). Moreover, *Wolff* neither affords prisoners the traditional tools for testing the strength of the evidence against them, such as the right to confrontation, cross-examination, or counsel, nor does *Wolff*

---

[3] The written statement requirement in *Wolff* derived from the requirement for such a statement in *Morrissey* v. *Brewer*, *supra*, which in turn relied upon *Goldberg* v. *Kelley*, *supra*, establishing procedural requirements in welfare termination proceedings.

afford them an unqualified right to present countervailing evidence in their defense. 418 U.S. at 566-570. *Wolff*, does not even require that formal rules of evidence be observed.

In light of the fact that this Court has allowed the required procedures to remain flexible and summary, it is hardly logical to conclude that this Court ever contemplated that a disciplinary board's substantive findings should, as a matter of constitutional law, be subject to formal and independent judicial review for "legal sufficiency of the evidence." *See Hill* v. *Superintendent*, 392 Mass. at 202. In *Wolff*, this Court was concerned that state created liberty interests not be "arbitrarily abrogated." 418 U.S. at 557. It was not concerned with the good faith discretionary acts of prison officials, made after the fundamental procedural requirements of notice and a fair hearing had been afforded.

B. *Lower Federal Court Decisions Do Not Require Review of the Sufficiency of Evidence in Disciplinary Hearings.*

The Court below cited two federal court decisions as being in accord with its ruling. Neither case stands for the proposition that there is an independent constitutional right to judicial review of the sufficiency of the evidence. Both *Smith* v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981), *cert. denied*, 455 U.S. 992 (1982) and *Wilwording* v. *Swenson*, 502 F.2d 844 (8th Cir. 1974), *cert. denied*, 420 U.S. 912 (1975), merely reflect the proposition that a claim of an arbitrary and capricious exercise of disciplinary power which deprives an inmate of a constitutionally protected liberty interest, may present a cognizable claim in a proceeding pursuant to 42 U.S.C. § 1983. The Supreme Judicial Court, it is suggested, has failed to distinguish between what constitutes a constitutionally cognizable claim of denial of due process in a statutorily authorized proceeding pursuant to § 1983 and whether an independent constitutional right of judicial review exists. These are quite

distinct inquiries and, it is submitted, neither provides the answer for the other. The Supreme Judicial Court's reliance on *Smith* and *Wilwording* is therefore misplaced. A further separate question is whether a claim of insufficient evidence to support the disciplinary board's sanction of loss of good time credits presents a constitutionally cognizable claim pursuant to § 1983.

Clearly, where *Wolff* has mandated certain procedural rights, such as notice of charges, a hearing before an impartial board, a qualified opportunity to present witnesses and a written statement of the evidence relied upon and the reasons for the disciplinary action, violation of these procedural rights may present a cognizable claim in a § 1983 proceeding. However, if the procedural protections required by *Wolff* are provided, the only constitutionally cognizable claim is whether there was an arbitrary and capricious denial of a liberty interest. *See gen.*, *Smith* v. *Rabalais*, 659 F.2d 539 (5th Cir. 1981); *Willis* v. *Ciccone*, 506 F.2d 1011 (8th Cir. 1974). In making that determination, it is suggested, the federally required standard is whether, on examination of the written statement, "any" evidence supports the disciplinary board's findings.

The Fourth Circuit has specifically held that questions concerning the competency and sufficiency of evidence, and the credibility of the witnesses are matters beyond the scope of inquiry in a § 1983 proceeding. *Russell* v. *Division of Corrections, Commonwealth of Virginia*, 392 F.Supp. 476 (W.D. Va. 1975), *aff'd*, 530 F.2d 969 (4th Cir. 1975). In a similar vein the Seventh Circuit has recently held that an allegation that a prison guard planted false evidence which implicated the inmate in a disciplinary violation presents no cognizable claim. Once the procedural due process protections required by *Wolff* have been provided the only function of a federal court in a § 1983 action is to review the statement of evidence upon which the disciplinary committee relied to determine if

the decision is supported by some or any facts. *Hanrahan* v. *Lane*, No. 82-2892 (7th Cir. October 30, 1984). Slip Opinion at 6. See also *Willis* v. *Ciccone*, 506 F.2d 1011, 1018 (8th Cir. 1974) (allegation that a disciplinary charge was based on false reports summarily dismissed where there was "any basis in fact" to support the disciplinary action). This limited right of review of disciplinary hearings in a § 1983 proceeding, where deprivations of fundamental constitutional rights are alleged, is consistent with the fundamental protection afforded by the Due Process Clause — freedom from arbitrary or capricious action. The cases however provide no support for the proposition that there is a constitutional right to review of the sufficiency of evidence upon which a prison disciplinary infraction is found. *Glick* v. *Sargent*, 696 F.2d 413, 415 (8th Cir. 1983); *Scott* v. *DeJarnette*, 470 F.Supp. 766 (E.D. Ark. 1979).

The Supreme Judicial Court has transformed the right to federal review in a § 1983 proceeding (which is limited to review for fundamental constitutional error) into an independent constitutional right to appellate-type review. The Court further erred in failing to recognize that the process that is due in the disciplinary context is simply the procedural requirements of *Wolff* which protect prisoners from "arbitrary actions extinguishing their privileges." *Redding* v. *Fairman*, 717 F.2d 1105 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1282 (1984).

Moreover, the Supreme Judicial Court has vastly expanded the scope of review by requiring an examination of the "legal sufficiency" of the evidence. Such a requirement implies that a disciplinary hearing is the equivalent of a criminal proceeding; a proposition which this Court rejected in *Baxter* v. *Palmigiano*, 425 U.S. 308, 319 (1976) wherein this court recognized that "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." See also, *McGinnis* v. *Stevens*, 543 P.2d 1221, 1235-1236 (Ala. 1975).

C. *Entitlement to Procedural Protections In General, Does Not Imply A Concomitant Right to Review for Sufficiency of the Evidence.*

Little can be pointed to in this Court's jurisprudence that would support the Supreme Judicial Court's assumption that due process requires not only a fair hearing, but an appellate type review of the sufficiency of the evidence at that hearing.

As noted above, there is no constitutional right to appellate review in criminal cases. Moreover, this Court has refused to extend the procedural protections required in certain administrative hearings to include appellate review.

For example, in *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (*per curiam*), welfare recipients, seeking judicial review of the sufficiency of the evidence supporting an agency determination which reduced their welfare payments, challenged on due process grounds, an Oregon court filing fee requirement which effectively precluded review of the agency determination because of their indigency. 410 U.S. at 657, nn.1 and 2; *see*, *Ortwein* v. *Schwab*, 498 P.2d 757, 760 (Ore. 1972).

This Court held that due process did not require judicial review. The pretermination evidentiary hearings which met the minimal requirements of due process as enunciated in *Goldberg* v. *Kelly*, 397 U.S. 254, 266-271 (1970) supplied all the process due. *Ortwein* at 659-660.

Again, in the context of deportation hearings, the Court specifically rejected the concept of judicial review of the legal sufficiency of evidence. In *Tisi* v. *Tod*, 264 U.S. 131 (1924), the Court was asked to consider the claim of an alien who challenged his deportation for the knowing possession with intent to distribute, certain seditious leaflets. Tisi claimed that there was no evidence to support the Secretary of Labor's finding that Tisi knew the seditious character of the material.

The Court ruled that, although the government introduced no direct evidence contrary to Tisi's testimony, the Secretary was not bound to believe Tisi, and there was other evidence from which Tisi's knowledge could have been reasonably inferred. The Court stated:

> We do not discuss the evidence, because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct, or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.
>
> The denial of a fair hearing is not established by proving merely that the decision was wrong. . . This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact, or in drawing a wrong inference from the evidence. . . [H]ere no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion, is shown.

264 U.S. at 133-134 [*citations omitted*]. Noting that the conduct of the hearing comported with all procedural requirements, the Court concluded, "[u]nder these circumstances mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law." 264 U.S. at 134.[4] *See also, United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 106 (1927); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957).

---

[4] It need hardly be said that the liberty interest at stake at a deportation hearing far outstrips a prisoner's interest in statutory good-time. *See, e.g., Landon* v. *Plasencia,* 459 U.S. 21, 34 (1982). *Compare, Wolff* v. *McDonnell,* 418 U.S. at 561.

Similarly this Court has limited its review of military courts-martial to jurisdictional issues and to review of "fundamental defects" rising to a constitutional level, and has left the development and application of military discipline to the executive and legislative branches. *Schlesinger* v. *Councilman*, 420 U.S. 738, 747, 758 (1975); *United States* v. *Augenblick*, 393 U.S. 348, 351-352 (1969); *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953). This Court has clearly held that review of courts-martial findings for sufficiency of the evidence is *not* a facet of its limited review for constitutional error. *Hiatt* v. *Brown*, 339 U.S. 103, 110 (1950); *Whelchel* v. *McDonald*, 340 U.S. 122, 124 (1950). "Factual determinations by a court-martial 'are not of constitutional significance' and, therefore, are beyond the scope of review by a civil court (*Levy* v. *Parker*, 478 F.2d 772, 797 (3rd Cir. 1973), *aff'd*, 417 U.S. 733 (1974)), so long as the court-martial trial was a 'disciplined contest' and not a 'spectacle' or a 'trial by ordeal' (*United States* v. *Augenblick*, 393 U.S. at 356)." *Bowling* v. *United States*, 552 F.Supp. 54, 62-63 (Ct. Cl. 1982), *aff'd*, 713 F.2d 1558 (Fed. Cir. 1983). *See Owings* v. *Secretary of United States Air Force*, 447 F.2d 1245, 1261 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 926 (1972).[5]

---

[5] The Supreme Judicial Court distinguished the case law governing review of courts-martial by noting that adequate review of a court-martial may be had within the system of military courts created by Congress. *Hill* v. *Superintendent*, 392 Mass. at 203, 466 N.E.2d at 822. However, the right to such internal review does not undercut the force of the analogy. Massachusetts Department of Correction regulations do provide for administrative appeals all the way to the Commissioner of Correction in cases involving loss of good-time. 103 Code Mass. Regs. § 430.18. Moreover, the potential deprivation of liberty as a result of disciplinary action in the military is far more weighty than that which results from prison discipline. *See, e.g., Hiatt* v. *Brown*, 339 U.S. 103 (1950) (soldier, convicted of murder by a court-martial, received a sentence including a dishonorable discharge, forfeiture of all pay and allowances, and twenty years imprisonment).

Finally, the fallacy of tying procedural safeguards to a review for the sufficiency of the evidence is made manifest upon examination of another case involving the state created liberty interests of prisoners. In *Hewitt* v. *Helms*, 459 U.S. 460 (1983), this Court found that Pennsylvania had created a liberty interest in freedom from transfer to administrative segregation. However, in light of the competing interests involved, this Court prescribed minimal procedural safeguards: notice of the reason for transfer and the opportunity for the inmate to respond, either orally or in writing. "So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." 459 U.S. at 476. It cannot be reasonably suggested, that simply because procedural safeguards were required, the Due Process Clause also compels judicial review of the legal sufficiency of the evidence on which the decisionmaker based his decision to transfer the inmate to segregation.

II. The Substantive Content of the Due Process Clause is the Protection Against Arbitrary Governmental Deprivation of Some Right.

A. *The Requisite Procedural Protections are Determined by the Specific Context of the Proceeding.*

This Court has often noted that the protection afforded by the Due Process Clause is flexible, and depends on the context in which it is applied. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). In examining that context this Court has weighed the relative interests of the individual and the state, and has balanced the potential utility of suggested due process safeguards against the potential burden such safeguards would impose on the public interest. *See Mathews*

v. *Eldridge*, 424 U.S. 319, 335 (1976); *Hewitt* v. *Helms*, 459 U.S. at 473; *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982).

In examining the relative interests of a prisoner and the state to determine the amount of protection afforded state prisoners, this Court has been cognizant of the critical need of prison officials to impose swift discipline and to insure safety within the prison, and of the special nature of the prison environment which makes these responsibilities so difficult. *See Wolff* v. *McDonnell*, 418 U.S. at 561-563; *Hewitt* v. *Helms*, 459 U.S. at 473-475; *Block* v. *Rutherford*, U.S. , 104 S.Ct. 3227, 3234-3235 (1984); *Hudson* v. *Palmer*, U.S. , 104 S.Ct. 3194, 3200-3201 (1984). This Court has emphasized that it does not intend to place the Due Process Clause "astride the day-to-day functioning of state prisons. . ." *Meachum* v. *Fano*, 427 U.S. 215, 229 (1976).

As was noted above, analogous due process limitations are found in this Court's rulings in the area of military justice involving important policy concerns similar to those which arise in prison disciplinary matters. This Court has consistently emphasized that its scope of review of courts-martial must be tempered by consideration of the special nature and needs of the military community. The military community requires an application of constitutional protections different from those applied in the civilian courts, because of the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline" in the military. *Parker* v. *Levy*, 417 U.S. 733, 758 (1974). These same concerns have been recognized as legitimate in the prison context. See, *Wolff* at 561-562. Because of the paramount need for regimentation enforced by strict discipline, the rules regulating military conduct cannot be held to the same standard by which civilian criminal law is judged.

> While a civilian criminal code carves out a relatively small segment of potential conduct and declares it crim-

> inal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. . . Much of the conduct proscribed by the military is not "criminal" conduct in the civilian sense of the word.

Middendorf v. *Henry*, 425 U.S. 25, 38 (1976). The same may accurately be said of prison discipline. *See* 103 Code Mass. Regs. 430.22, "Code of Offenses."

Wolff itself sets forth the primary purpose for establishing procedural safeguards at prison disciplinary hearings: to prevent the arbitrary abrogation of the state created right to good time. 418 U.S. at 557. As this Court observed, "the touchstone of due process is protection of the individual against arbitrary action of government." 418 U.S. at 558.

B. *Substantive Due Process Review of Prison Disciplinary Board Findings Should be Limited to Errors which are So Flagrant or Manifest as to Constitute an Arbitrary Deprivation of the Prisoner's Liberty Interest.*

Where substantive rights inherent in the Constitution are at issue, this Court has stated that, absent manifest evidence that prison officials abused their authority, courts should be circumspect in exercising their authority to review the actions of prison officials. *See, e.g., Bell* v. *Wolfish*, 441 U.S. 520, 547-548 (1979); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126-133 (1977). Although a prisoner's interest in statutory good time is an interest of "real substance," there is no substantive right inherent in the Constitution which guarantees good-time credit for satisfactory behavior while in prison. *Wolff* v. *McDonnell*, 418 U.S. at 557. Good-time credit is a right created by the state Legislature, and presumably, the state Legislature may withdraw the right

without its action being subject to independent judicial review under the Due Process Clause. *Cf. St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936).[6] *Compare Meachum* v. *Fano*, 427 U.S. 215 (1976) (transfer of prisoner to maximum security prison in no way implicated the Due Process Clause where state had not created a right to remain in lesser security institution); and *Olim* v. *Wakinekona*, 461 U.S. 238 (1983) (same, with respect to transfer of state prisoner to out-of-state maximum security prison); with *Hewitt* v. *Helms*, 459 U.S. 460 (1983) (placement of state prisoner in administrative segregation implicated the Due Process Clause where the state had created a right to freedom from such placement absent certain findings by prison officials).

---

[6] In *St. Joseph Stock Yards*, this Court considered an appeal from the dismissal of a federal suit to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for services rendered by St. Joseph Stock Yards Co. The company claimed the rates set were unconstitutionally confiscatory. The Court noted that it is generally within the power of the Legislature to create an administrative agency and endow it with the power to make conclusive findings of fact, "provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily." 298 U.S. at 51. However, when the Legislature's power is circumscribed by a substantive right inherent in the Constitution itself, such as an individual's right to property, which cannot be deprived absent due process or just compensation, the Legislature cannot create an agency to do what the Legislature itself may not. In such cases, agency action is subject to an "independent judicial judgment upon the facts," just as legislative action would be. 298 U.S. at 51-54.

In the instant case, there is no similar substantive right, inherent in the Constitution, which acts as a limit to legislative authority. The right to good-time is derived from the state, not found within the Constitution. Since the state creates and defines such rights, it can, presumably, also withdraw them, and any agency it creates to administer them should only be subject to the general limitations of due process, without also being subject to independent judicial review. In a sense, this is a distinction between those rights which are "fundamental" and therefore are protected by the Constitution, and those rights whose deprivation by the state merely implicates the Constitution because of the Constitution's general substantive limitation, embodied in the due process and equal protection clauses, on state action.

Given the limited nature of the liberty interest at stake, and given the fact that the liberty interest has no independent constitutional basis, judicial review of a disciplinary board's action resulting in curtailment of that interest should not exceed the general due process review for arbitrary government action. Furthermore, given the specialized and difficult task of imposing strict discipline and insuring security in the prison setting, and given the wide variety of behavior which is properly proscribed in prison, the reviewing court should limit its review to fundamental procedural defects, flagrant or manifest error, or willful disregard of the evidence before the board. *Cf. Schlesinger* v. *Councilman*, 420 U.S. at 747, 758 (1975); *United States* v. *Augenblick*, 393 U.S. at 351-352; *Burns* v. *Wilson*, 346 U.S. at 140; *Tisi* v. *Tod*, 264 U.S. at 133-134. Courts should not second-guess the conclusions of prison administrators, who "have a better grasp of [their] domain than [a] reviewing judge. . ." *Bell* v. *Wolfish*, 441 U.S. at 548; *see*, *Block* v. *Rutherford*, 104 S.Ct. at 3234.

In expanding prisoners' constitutional rights beyond established due process requirements, the Supreme Judicial Court has imposed potentially crushing costs upon state correction officials. It subjects every prison disciplinary proceeding, which implicates some state created liberty interest, to the possibility of independent judicial review, regardless of the fact that all procedural safeguards have been afforded and regardless of the fact that prison officials have acted in good faith.[7] It would also ignore this Court's determination in *Wolff*

---

[7] In 1980, in Massachusetts correctional institutions, 8,814 disciplinary reports were issued. Seventy-eight percent of those reports, or 6,914, were written for "major" infractions, thus triggering the requirement for full disciplinary hearings. Cronin and Scott, *Correctional Disciplinary Statistics – 1980*, Mass. Dept. Correction, Table 4, p. 12 (1983). *See* 103 Code Mass. Regs. § 430.11, requiring the institution of full disciplinary proceedings for major offenses.

that prison disciplinary proceedings should not be so "legalized" as to create a confrontational forum and would impose additional costs on prison administrations thereby detracting from other correctional goals.[8] *See e.g., Wolff* v. *McDonnell*, 418 U.S. at 569-570 (introduction of counsel into

[8] Unlike the courts, prisons are not institutions whose principal, or even major, function is dispute resolution or the dispensation of justice. Prisons in America today are charged with the responsibility of punishment, rehabilitation, education, and the provision of basic physical and psychological needs, not to mention provision of legal resources so that inmates will be assured meaningful access to the courts to vindicate a broad range of rights. *See, e.g., Rhodes* v. *Chapman*, 452 U.S. 337, 352 (1981); *Association for Reduction of Violence* v. *Hall*, 558 F.Supp. 661, 663-664 and n.1 (D. Mass. 1983), *vacated on other grounds*, 734 F.2d 63 (1st Cir. (1984); *Jones* v. *Wittenburg*, 509 F.Supp. 653, 692-694 (N.D. Ohio 1980); *Cepulonis* v. *Fair*, 732 F.2d 1 (1st Cir. 1984). *See also* Burger, *An Agenda for Crime Prevention and Correctional Reform*, 67 ABA Journal 988 (1981), and Burger, *More Warehouses, or Factories with Fences?*, 8 New Eng. J. Prison Law 111 (1982) (calling for expansion of vocational training and meaningful work opportunities for inmates as well as special training for prison personnel).

Numerous studies and comments attest to the growth of prisoner litigation in the last decade. *See, e.g.*, Widener, *Foreward: The Impact of Judicial Decision-Making*, 37 Wash. and Lee L. Rev. 373 (1980); Phillips, *Foreward: Fourth Circuit Review*, 39 Wash. and Lee L. Rev. 425, 426 (1982); *Sourcebook of Criminal Justice Statistics*, U.S. Dept. of Justice, Table 5.8, p. 469 (1982). Expansion of the role of the judiciary in prison discipline can be expected to contribute to the further proliferation of prisoner lawsuits, with obvious implications for the costs in time and resources to prison officials who must defend these suits. *See* Jacobs, *Stateville: The Penitentiary in Mass Society*, 106, 136 (1977); Bershad, *The Law and Corrections: A Management Perspective*, 4 New Eng. J. Prison Law, 49, 57, 59 (1977). Such litigation also promotes an adversarial atmosphere within the prison and exacerbates the "we-they" relationship between inmates and prison officials. Singer, *Prisoner Rights Litigation: A Look at the Past Decade and a Look at the Coming Decade*, 44 Federal Probation 3, 7 (1980). To the extent that a Constitutional right to review for sufficiency of the evidence compels prison administrators to transform the summary proceedings envisioned in *Wolff* into more trial-type proceeding, prisons will bear the costs of establishing a legally trained, quasi-judicial bureaucracy. *See* Jacobs, *supra* at 119; Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 639 (1979).

prison disciplinary proceedings, with its concomitant increase in costs to the state and increase in the confrontational nature of the proceeding would decrease the utility of such proceedings as a means of furthering other correctional goals). *Cf. Goss* v. *Lopez*, 419 U.S. 565, 583 (1975) (imposition of even truncated trial-type procedures in the public school setting might overwhelm administrative facilities and, by diverting resources, cost more than it would save in educational effectiveness); *Parham* v. *J.R.*, 442 U.S. 584, 605-606 and nn.14 and 16 (1979) (introduction of judicial-type proceedings for voluntary admission of minors to state mental health facilities may deflect mental health professionals from their primary role of patient care, deflect financial resources from mental health care, and turn rational decisionmaking into an unmanageable enterprise).

1. There Was No Arbitrary Deprivation of a Liberty Interest.

The Supreme Judicial Court made no finding that Hill and Crawford were denied their fundamental procedural rights under the Due Process Clause, and it assumed that prison officials acted in good faith. The evidence indicated that Hill and Crawford, with a third inmate, were running together from the area within the bounded confines of the assault immediately after the assault. There was a commotion surrounding the assault which would likely have drawn the inmates' attention, yet Hill and Crawford both claimed ignorance of the incident.[9] Though the evidence was circumstantial rather than direct,

[9] The respondents' profession of ignorance, under circumstances in which they might reasonably be expected to have some knowledge and, if helpful to them, to divulge it, may properly have raised an adverse inference in the minds of the board members. *See Baxter* v. *Palmigiano*, 425 U.S. 308, 318-319 and n.3 (1976), and cases cited therein.

there was no flagrant or manifest lack of evidence which would justify a finding that the board acted to arbitrarily deprive Hill and Crawford of good time. That the state court might draw a different inference from the evidence presented does not render the disciplinary board's finding arbitrary, nor does it render the hearing fundamentally unfair.

Conclusion.

For the reason stated above the decision of the Supreme Judicial Court should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,

BARBARA A.H. SMITH,
Assistant Attorney General, Chief,
Criminal Appellate Division,
Counsel of Record

MARTIN E. LEVIN,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

Addendum.

103 CMR: DEPARTMENT OF CORRECTION REGULATIONS.

430.09: Preliminary Responsibilities of the Disciplinary Officer

(1) Within two (2) weekdays after receipt of the disciplinary report, the disciplinary officer shall review the disciplinary report, make whatever investigation he deems necessary and either:

(a) Dismiss the disciplinary report,

(b) With the approval of the superintendent take no immediate action on it pending the receipt of further information, or

(c) Proceed with formal disciplinary action.

(2) If the disciplinary officer decides to proceed with formal disciplinary action he shall within the aforesaid two (2) weekdays designate the offense charged as a minor or major matter and he may revise or supplement the disciplinary report. If the charge against the inmate includes the alleged commission of a felony, the disciplinary officer shall immediately notify the superintendent so that he may refer the case to the district attorney for possible prosecution. Any case referred to the district attorney shall be handled as a major matter.

(3) In designating the offense as a minor or major matter the disciplinary officer shall consider the following factors:

(a) Threat to institution security

(b) Repetitiveness

(c) Extent of harm done

(d) Mitigating circumstances

Cases involving little or no threat to the well being of others, to property, or to the security of the institution shall ordinarily be designated as minor matters.

. . . . . .

430.13: The Disciplinary Board's General Powers

(1) The chairman of the disciplinary board shall govern the conduct of every phase of a hearing before the disciplinary board including, but not limited to, the interpretation and construction of these regulations and the conduct of all parties before the board.

(2) The members of the disciplinary board shall be impartial. An inmate may challenge the impartiality of any member of the board. The inmate shall address his objection to the chairman and shall state his reasons for believing the board member to be not impartial at the beginning of the hearing. The chairman shall remove the member challenged where the chairman determines that the inmate has stated substantial reasons to support his claim that the challenged member could not sit as an impartial member of the disciplinary board. For example, a witness to the event at issue shall not sit as a member of the disciplinary board. When a member has been removed from the disciplinary board, the superintendent or his designee shall designate a replacement as soon as practicable.

(3) The board shall not be bound by the rules of evidence observed by the courts. The chairman may admit and the board may give probative effect only to evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

(4) All parties, counsel, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. The chairman may take whatever appropriate actions are necessary to conduct a hearing when confronted with improper conduct of any participant.

(5) All findings of fact, determinations of guilt or innocence, and impositions of sanctions shall be determined by a majority vote of the board.

430.14: Fact Finding Aspects of Hearing Before Disciplinary Board

(1) Before the chairman reads the charge at a hearing regarding a disciplinary offense which has been or may be referred to the district attorney for prosecution, he shall advise the inmate that he has a right to remain silent and that anything he says during the hearing may be used against him in any subsequent criminal proceedings.

(2) At the beginning of the hearing before a disciplinary board the chairman shall read the charges to the inmate and after giving any warning required by 103 CMR 430.14(1) ask the inmate if he wishes to admit or deny the charges. If the inmate admits the charges the board may immediately consider the evidence in mitigation of guilt and the sanction.

(3) If the inmate does not admit the charges the chairman shall conduct a fact finding hearing at which the disciplinary board may consider written, oral and physical evidence. All evidence considered by the disciplinary board shall be presented in the presence of the inmate except informant information which may be presented in accordance with the provisions of 103 CMR 430.15.

(4) If the inmate requests the presence of the reporting officer in accordance with the provisions of 103 CMR 430.11 and/or 430.12, the reporting officer shall attend the hearing except when the chairman determines in writing that the reporting officer is unavailable for prolonged period of time as a result of illness or other good cause. Such written determination shall be reviewed by the superintendent prior

to the commencement of the hearing. The superintendent may approve the determination or disapprove it and require rescheduling of the hearing at a time when the reporting officer will be available. The chairman in his discretion may also require the presence of the reporting officer on his own motion.

(5) The inmate shall be allowed but shall not be compelled to make an oral statement or to present a written statement in his own defense or in mitigation of punishment.

(6) The inmate shall be allowed to question the reporting officer, to question other witnesses, to call witnesses in his defense, or to present other evidence, when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. The factors that the chairman may consider when ruling on an inmate's questioning of witnesses, offer of other evidence, or request to call witnesses shall include, but shall not be limited to, the following:

(a) Relevance
(b) Cumulative testimony
(c) Necessity
(d) Hazards presented by an individual case.

The chairman, in his discretion, may call witnesses on his own motion, and the chairman or the board members may question witnesses or the reporting officer on their own motion.

(7) The inmate shall be allowed to present relevant, non-cumulative documentary evidence in his defense.

. . . . . .

430.16: Deliberation and Decision by the Disciplinary Board

(1) After the close of the evidence, the disciplinary board shall meet in executive session to deliberate and determine

the guilt or innocence of the inmate. The burden of proof shall be on the proponent of the disciplinary report and the disciplinary board shall make its findings on the basis of the preponderance of the evidence.

(2) If the inmate is found guilty, the disciplinary board may impose one or more of the sanctions listed in 103 CMR 430.23. The inmate's record shall not be considered by the disciplinary board in determining the guilt or innocence of the inmate but it may be considered by the disciplinary board in deciding the appropriate sanction. The disciplinary board may also in its discretion recall the inmate after reaching a guilty finding but prior to deciding on a sanction to discuss issues related to its decision on a sanction.

430.17: Record of Disciplinary Proceedings

(1) If a guilty finding is reached the disciplinary board shall prepare a written decision containing the following:

(a) A description of the evidence relied upon by it in reaching the guilty finding;

(b) A statement of the reasons for the sanctions imposed;

(c) A notice of the right to appeal.

This written decision shall be given to the inmate within two (2) weekdays of the close of the hearing.

(2) The evidence relied upon for the guilty findings and the reasons for the sanction shall be set out in specific terms unless the hearing has involved use of informant information pursuant to 103 CMR 430.15 and such specificity would create a substantial risk of harm to the informant, another person or institutional security.

430.18: Appeal Procedures

(1) An inmate may appeal the finding and/or sanction of the disciplinary board regarding a major matter or an appeal

of a minor matter to the superintendent within five (5) days following the inmate's receipt of the disciplinary board's written decision.

(2) The superintendent as the appellate authority may sustain the finding and sanction of the disciplinary board, order a rehearing, reduce or suspend the sanction, or reverse the decision and dismiss the charges. In no event shall an appellate authority increase any sanction on an appeal from a decision of the disciplinary board. The superintendent shall ordinarily act on an appeal within two (2) weekdays of its receipt by him.

(3) Any case in which the sanction includes recommended good-time forfeiture shall be reviewed by the commissioner in accordance with M. G. L. c. 127, s. 129.

(4) The commissioner may in his discretion appoint an individual or group of individuals to serve as the appellate authority in place of the superintendent in any disciplinary case or class of cases.

. . . . . .

430.22: Code of Offenses

Disciplinary offenses shall include the following acts:

(1) Disobeying an order of, lying to, or insolence toward a staff member.

(2) Violating any departmental rule or regulation, or any other rule, regulation, or condition of an institution or community-based-program.

(3) Failure to keep one's person or one's quarters in accordance with institutional rules.

(4) Being out of place.

(5) Unexcused absence from, willful failure to properly perform or refusal to accept a work or program assignment.

(6) Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper.

(7) Tampering with or blocking any locking device, door, gate or window.

(8) Conduct which disrupts or interferes with the security or orderly running of the institution.

(9) Escape or possession of escape tools.

(10) Manufacture, possession, introduction or use of any unauthorized controlled substance, alcoholic beverage or associated paraphernalia.

(11) Misuse of authorized medication, for example the unauthorized accumulation of prescribed medication.

(12) Refusal to take a breathalizer test or to provide a urine specimen.

(13) Gambling.

(14) Participating in or encouraging a riot, work stoppage, hostage taking, or unauthorized group demonstration.

(15) Possession, manufacture or introduction of a gun, firearm, explosive, ammunition, weapon, sharpened instrument, knife or tool.

(16) Killing.

(17) Self mutilation.

(18) Fighting with, assaulting or threatening another person with any offense against his person or property.

(19) Use of obscene, abusive or threatening language, action or gesture to any inmate or staff member.

(20) Engaging in unauthorized sexual acts with others.

(21) Setting a fire.

(22) Willfully destroying or damaging state property or the property of another person.

(23) Unauthorized possession of property belonging to another person.

(24) Possession of anything, including money or currency, not authorized for retention or receipt by the inmate.

(25) Giving money or anything of value to or accepting money or anything of value from another inmate, a member of his family or his friend, without authorization.

(26) Stealing.

(27) Giving or offering any official or staff member a bribe.

(28) Giving or offering any official or staff member any item or service of value.

(29) Extortion, blackmail, protection; demanding or receiving money or anything of value in return for protection against others.

(30) Violating any law of the Commonwealth of Massachusetts or United States.

(31) Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as commission of the offense itself.

430.23: Sanctions

(1) Minor sanctions shall include:

(a) Reprimand.

(b) Loss of privileges for a specified period of time.

(c) Room restrictions.

(d) Restitution.

(e) Extra-work duty for a specified period of time.

(2) Minor sanctions may be suspended for a specified period of time not to exceed 3 months.

(3) Major sanctions shall include:

(a) Isolation for a specified period of time not to exceed 15 days for one offense.

(b) Recommended good time forfeiture.

(c) All minor sanctions.

(4) Major sanctions may be suspended for a specified period of time not to exceed 6 months.